SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 308

SCOTT M. LOFTIN AND WM. R. KENAN, JR., AS RECEIVERS OF THE FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CROWLEY'S, INC., A FLORIDA CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND SUPPORTING BRIEF.

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Counsel for Petitioners.

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CROWLEY'S, INC., A FLORIDA CORPORATION.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of Scott M. Loftin and Wm. R. Kenan, Jr., as Receivers of the Florida East Coast Railway Company, for a writ of certiorari to the Supreme Court of Florida to review the judgment entered by it affirming the judgment of the Circuit Court of Dade County, Florida, in a cause therein lately pending, wherein Crowley's, Inc., was plaintiff and petitioners were defendants, alleges:

I.

Summary Statement of the Matter.

Petitioners are the Receivers of the Florida East Coast Railway Company, duly appointed by the District Court

of the United States for the Southern District of Florida, in an equity cause therein pending, by an order directing them to take charge of and operate the system of transportation of the Florida East Coast Railway Company.

Florida East Coast Railway Company is a common carrier by railroad, in interstate and intrastate commerce, between Jacksonville, Florida, and Miami, Florida.

On March 31, 1941, the respondent Crowley's, Inc., brought an action at law in the Circuit Court of Dade County (Miami), Florida, against the Receivers to recover damages alleged to have resulted to a motor truck and trailer (and the cargo) from the negligent operation of a switch engine, on January 2, 1940, when it struck the truck and trailer at a grade crossing at Northwest Seventh Avenue on what was known as the "Hialeah Belt" in the Miami terminals of the Florida East Coast Railway.

The declaration was in the conventional form. The defendants filed pleas of, (1) not guilty,[1] and (2) contributory negligence. The case was tried to a jury. The undisputed evidence of the plaintiffs showed damages of approximately $12,500. It was proved that a portion of the damages was covered by insurance for which Crowley's had received $7600 from the United Mutual Fire Insurance Company. The jury rendered a verdict for the plaintiffs in the sum of $3550—or half the amount paid by the insurance company—for which judgment was entered.

The Receivers appealed to the Supreme Court of Florida. On June 23, 1942, the judgment was affirmed by that Court (R. 212).

II.

Jurisdictional Statement.

The statutory provision upon which it is contended that this Court has jurisdiction to review the judgment in ques-

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[1] Under the state practice this plea denied the wrongful act and the damages.

tion is § 237 of the Judicial Code, as amended (United States Code, 1940 Edition, Title 28, Chapter 9, § 344) wherein it is provided:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution of * * * the United States."[2]

In this case the plaintiff in the trial court (respondent here) relied upon two Florida statutes, the one (§ 7051, C. G. L. 1927) providing that railroads shall be liable for damage done by the operation of their trains unless they make it appear that they exercised due care, and creating a presumption of negligence against them, and the other (§ 7052) establishing the comparative negligence rule in actions against railroads. The defendants (petitioners here) objected to charges to the jury, by the trial judge, predicated upon these statutes, upon the ground that they were repugnant to the Constitution of the United States (Amendment XIV). The trial judge gave the charges.

On appeal, after the rendition of judgment for the plaintiff, the giving of these charges was assigned as error in the Supreme Court of Florida, but that Court upheld the validity of the statutes upon which the charges were based, approved the giving of the charges, and affirmed the judgment of the Dade County Court.

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[2] An appeal would lie also under Title 28, § 344(a).

The date of the judgment of the Supreme Court of Florida sought to be reviewd is June 23, 1942 (R. 212). *Loftin et al.* v. *Crowley's, Inc.*, 8 So. (2d) 909.

On July 6, 1942, the Supreme Court of Florida stayed the execution and enforcement of its judgment for ninety days to enable petitioners to apply for a writ of certiorari to this Court and withheld its mandate for that period (R. 213).

The opinion of the Supreme Court of Florida affirming the judgment of the Circuit Court of Dade County will be found on pages 205-211 of the certified copy of the record filed herein.

The date on which this petition for a writ of certiorari, the supporting brief, and the record were filed with the Supreme Court of the United States is August 1, 1942.

III.

Question Presented.

The question presented by this application is:

> "Do Sections 7051 and 7052, Compiled General Laws, 1927 (of Florida), enacted more than fifty years ago, offend against the Constitution of the United States in that they deny to the operators of railroad trains the equal protection of the laws afforded to operators of motor vehicles, both agencies having been declared by the Florida court to be dangerous instrumentalities, and the dangers incident to hazardous operations having been declared by it to be the basis of the classification upon which such statutory liability was predicated?"

It was so recognized by the Supreme Court of Florida (R. 206).

IV.

Reasons Relied On for the Allowance of the Writ.

For more than fifty years there have been in force in the State of Florida, Sections 7051 and 7052, Compiled General Laws of 1927, which provide:

> "7051. (4964). *Liability of railroad company*—A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. (Ch. 4071, Acts 1891, § 1.)"

> "7052. (4965.) *When recovery of damages forbidden.* No person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him. (Id. § 2.)"

The constitutionality of these statutes has been upheld repeatedly by the Florida court of last resort.

Atlantic Coast Line Ry. Co. v. *Coachman* (1910), 59 Fla. 130, 52 Sou. 377;

Hayes v. *Walker* (1907), 54 Fla. 163, 44 Sou. 747;

Seaboard Airline Railway v. *Watson* (1931), 103 Fla. 477, 137 Sou. 719.

The last cited case was appealed to this Court but the appeal was dismissed for want of a substantial federal question.[3]

Seaboard Airline Railway v. *Watson* (1932), 287 U. S. 86, 53 Sup. Ct. 32, 77 L. Ed. 180, 86 A. L. R. 174.

Since those decisions, however, both this Court and the Supreme Court of Florida have held that statutes, though valid when enacted under conditions existing at that time, may become invalid by reason of changed conditions that deny the equal protection of the laws.

N., C. & St. L. Railway v. *Walters* (1935), 294 U. S. 495, 55 S. Ct. 486, 79 L. Ed. 949;

Atlantic Coast Line Railway v. *Ivey* (1941), 148 Fla. —, 5 Sou. (2d) 244.

Upon the reasoning of these cases, the petitioners contend that these statutes have become unconstitutional even though they were valid when enacted. The Florida Court sustained the statutory classification as to railroads because of their dangerous character. It has held that motor vehicles have become not only as dangerous but more so. Therefore, in a suit growing out of a collision between a railroad train and a motor vehicle the statutes imposing an arbitrary presumption of negligence upon the *less dangerous instrumentality* and depriving the railroad of the defense of contributory negligence deny it the equal protection of the laws and deprive it of its property without due process of law in violation of Article XIV of the Amendments to the Constitution of the United States.

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[3] The *Watson* case, however, involving a collision between a railroad train and a mule team, clearly is distinguishable from the case at bar involving a collision between a railroad train and a motor vehicle that has been described by the Florida Supreme Court as "the most deadly machine in America."

Crenshaw Bros. v. *Harper* (1940), 142 Fla. 27, 194 Sou. 353.

In accordance with the rules of this Court, a concise memorandum is filed herein in support of this petition.

WHEREFORE, your petitioners pray that a writ of certiorari be issued to the Supreme Court of Florida commanding it to transmit the record of its judgment of June 23, 1942 affirming the judgment of the Circuit Court of Dade County, Florida, in the cause styled "Scott M. Loftin and Wm. R. Kenan, Jr., as Receivers of the Florida East Coast Railway Company, Plaintiffs-in-error vs. Crowleys, Inc., a Florida corporation, Defendant-in-error," for review and determination herein.

Miami, Florida, this 1st day of August, 1942.

RUSSELL L. FRINK,
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Attorneys for Petitioners.